By Fax: 2877 8024

8 December 1999

Clerk to Subcommittee,
Subcommittee on Immigration
(Amendment) Regulation 1999,
Legislative Council.
(Attn: Mrs Sharon Tong)

Dear Mrs Tong,

Subcommittee on
Immigration (Amendment) Regulation 1999

I refer to your letter of 30 November 1999 and provide the Administration's response to the issues raised by Members at the meeting on 29 November 1999. The issues are set out in the order as they appear on the list attached to your letter. A draft Resolution containing all proposed amendments to the Amendment Regulation is attached at the Annex.

Regulation 9A(2) and proposed regulation 9B(2)

The subcommittee was of the view that since both regulation 9A(2) and the proposed regulation 9B(2) do not specify the nature of appeals to the Tribunal, this could cause confusion as to which Schedule regulates section 53A appeals in respect of removal orders and which regulates section 2AD appeals in respect of certificate of entitlement. It asked the Administration to consider spelling out explicitly in Regulation 9A that the appeals in Regulation 9A(2) refer to those as stated in Regulation 9A(1), and to consider whether Regulation 9B should be amended along the same line for the purpose of clarity.

The Administration's view is that when the proposed regulation 9B is read in its entirety, it is perfectly clear that Schedule 4 regulates section 2AD appeals. It is likewise clear in regulation 9A that Schedule 3 regulates section 53A appeals. We therefore think that no amendments to regulation 9A(2) and the proposed regulation 9B(2) are necessary. Nevertheless, for discussion purpose, an amended version of the two regulations is included in the Annex.

Transitional provision

Sections 2AD(1) and (2) provide that appeals should be lodged within 90 days from the receipt of the notice of refusal given by the Director. Section 2AD(4) provides that the Tribunal may accept an appeal not lodged within the prescribed time limit.

Some Members were of the view that since the certificate of entitlement scheme has come into operation for over 2 years, a transitional provision should be made so that those applicants whose applications have been refused before this Amendment Regulation was made could still have at least 90 days for lodging their appeals. The Administration was asked to examine whether a transitional provision should be provided in Schedule 4 to deal with appeals lodged between the time after the Immigration (Amendment)(No. 3) Ordinance 1997 came into operation and before the Amendment Regulation came into force.

The Administration confirms that the Director has not refused any application for a certificate of entitlement or for a certified duplicate of a certificate of entitlement since 1 July 1997; and no notice of refusal has been given. In other words, the prescribed period of 90 days for lodging an appeal has not started to run in respect of any of the existing cases and no appeal has been lodged. It was suggested by the subcommittee that the Administration might be wrong on this score because there was a possibility that some of the correspondence that the Director had with the applicants might be construed as a notice of refusal notwithstanding the intention otherwise. Even if this were the case, which the Administration regards as extremely unlikely, the Administration confirms that we will formally serve a letter of refusal on

each and every applicant whose application has been refused, informing him or her of the right of appeal within 90 days from the receipt of the refusal letter. This will heal any misunderstanding that any previous correspondence was construed as a notice of refusal. In these circumstances, the Administration considers that there is no practical need for transitional provisions to be made. Nevertheless, for discussion purpose, a proposed regulation which provides for transitional arrangements is included in the Annex.

Hearings of appeals against removal orders heard in the absence of appellant

The Administration was asked to provide information on the number of appeals against removal order heard in the absence of a person about to be removed. Between January 1997 and October 1999, there were 55 appeal hearings. Four of them were conducted in the absence of the persons concerned because they failed to turn up.

Meaning of "appellant" in Schedule 4

Under section 2AD(1) and (2), the "applicant" may appeal against the decision of the Director of Immigration. But the term "applicant" under section 2AD may have two meanings -

(a) an applicant who applied on his own behalf outside Hong Kong for a certificate of entitlement or a certified copy thereof;
(b) sections 2AB(2)(b) and 2AC(2)(b) specially allow another person such as parent etc. to apply for a certificate of entitlement or a certified copy thereof on behalf of the original applicant. Under section 2AB(2)(b) and 2AC(2)(b), the person applying on behalf of another person "shall be regarded as the applicant" for the purpose of section 2AD(1);

Under (a), the applicant himself will be the appellant; whereas under (b), the person applying on the behalf of another person will be the appellant.

In order to clarify the above confusion on the meaning of "appellant", the term "appellant" is proposed to be defined in paragraph 1 of the proposed Schedule 4 so that the Tribunal rules are applicable to all appeals, irrespective of whether or not the appellant is the applicant or a person who has applied on behalf of the applicant. However, the sub-committee considered that it may be necessary to clarify the meaning of this term in different parts of Schedule 4. The Administration considers that this is not necessary, since except paragraph 14, the whole Schedule 4 should apply to both types of appellant.

Paragraph 14 lists out the only circumstances where the tribunal may conduct a hearing in absentia of the "appellant". Although paragraph 14(1)(a) could only apply to an applicant applying on his own behalf, there is no need to further define the term "appellant" merely for the purpose of this paragraph. The meaning is sufficiently clear since there is already a reference to section 2AD(3), which could only apply to an appellant who has applied on his own behalf initially by virtue of section 2AD(10), which states that for the purpose of section 2AD(3), the term "appellant" does not include a person making the initial application on behalf of another person. Having said that, if the subcommittee considers that further clarification is desirable, a new subparagraph (4) could be added to paragraph 14 to state that - "For the purpose of sub-paragraph (1)(a), "appellent" does not include a person making an application on behalf of another person under section 2AB(2)(b) or 2AC (2)(b)".

In order not to further confuse the reader by having another different definition of "appellant" in the same schedule, it is proposed to delete the definition of "appellant" in paragraph 1.

Apart from the above proposed amendments in paragraph 14, the Administration would also like to introduce a technical amendment to paragraph 14(1)(a), by deleting "unable to appear in person by reason of section 2AD(3) of the Ordinance" and substitute "not allowed to lodge an appeal at any time at which he is in Hong Kong under section 2AD(3) of the Ordinance" in order to achieve consistency with the wording of section 2AD(3).

Natural justice

Paragraph 14(1)(a), (b) and (c) of the proposed Schedule 4 provides for the only circumstances that the Tribunal may hear an appeal in the absence of the appellant. The Administration does not consider that they would violate the rules of natural justice of the right to be heard. Although the Tribunal will have to determine questions of fact, the facts to be determined relate to the parentage and place of birth of the appellant, which are not matters on which appellants can themselves give direct evidence.

Subparagraph (1)(a)

This paragraph only deals with the situation where the appellants are people who have made their applications for certificates of entitlement or certified copies thereof on their own behalves. These people could only apply for the certificates or certified copies thereof outside Hong Kong, and they are also prohibited from lodging appeals when they are in Hong Kong. The policy of the certificate of entitlement scheme requires persons claiming right of abode to remain outside Hong Kong during all stages of the application procedure, including any appeals. One must distinguish between a permanent resident who enjoys the rights of abode on the one hand and a person claiming to be a permanent resident on the other hand. The Administration considers that it is reasonable to introduce a scheme, including appeal system in that scheme, which provides for the verification of a person's claim to be a permanent resident. Further, the provisions of the scheme whereby he must stay outside Hong Kong whilst applying for such a certificate and whilst appealing against any refusal of the Director to issue a certificate or a certified copy thereof have been held by the Court of Final Appeal to be constitutional. In its judgment in Ng Ka Ling v. Director of Immigration [1999] 1 HKLRD 315 at p. 348E the Court of Final Appeal state that -

> "the provisions of the scheme whereby [a claimant] must stay in the Mainland while applying for [a certificate of entitlement] and whilst appealing against any refusal of the Director to issue a certificate are also constitutional."

Although the tribunal may hear the relevant appeal in the absence of the appellant, it also needs to observe the safeguard provided for in paragraph 14(1), and that is, it could only exercise this power if "it would be proper in all the circumstances to proceed in the absence of the appellant".

Furthermore, the appellant may also appoint a representative under paragraph 9 of the Schedule to appear on his behalf. That representative could either be a lawyer or his close relative who is able to give detailed evidence to the Tribunal, and if necessary, to apply for an adjournment until the appellant could appear in person to give evidence himself.

According to the record of the Immigration Department, the vast majority of the applications are made by another person on behalf of the applicant. In those cases, according to section 2AB(2)(b) and 2AC(2)(b), the "appellants" would be those people rather than the applicants. Paragraph 14(1)(a) does not prejudice their rights to be heard since they are able to lodge the appeals when they are in Hong Kong.

Paragraph 14(1)(b) and (c)

These paragraphs apply to all "appellants" whether or not they are people applying on behalf of the applicants. In order to expedite the process of appeals so as not to delay the cases of other appellants, the Administration considers that it is reasonable to conduct the hearing in the absence of the appellant if he refuses to appear or he is unable to appear due to illness or he would present a threat to other people in the hearing. Further, the Tribunal also needs to consider whether it is proper to proceed in all the circumstances to proceed in the absence of the appellant. And the appellant may also appoint a representative who may either be a lawyer or a close relative to appear on his behalf.

Meaning of "lodging an appeal"

The Administration's understanding of the meaning of "no appeal shall be lodged" in section 2AD is that it refers to the action of the applicant taken under section 2AD(1) or (2). Specifically, it refers to the

submission of a notice of appeal to the chief adjudicator of the Tribunal. It does not include the subsequent appeal procedure and hearing of the appeal.

Presence of applicants in Hong Kong and right to appear at hearing

The Administration's position is that an appeal under section 2AD should be lodged when the applicant is outside Hong Kong as required under section 2AD(3). Once an appeal is lodged, there is nothing to prevent the applicant from entering and remaining in Hong Kong lawfully, provided normal immigration criteria are met. However, the lodging of an appeal does not give the applicant the right of abode or right to land or remain in Hong Kong pending the decision of the Tribunal on the appeal (section 2AD(9) refers). Overstayers and those who enter illegally will be liable to prosecution and removal by the Director of Immigration. Where the applicant is present in Hong Kong and is therefore able to appear in person before the Tribunal, the Tribunal could exercise its discretion to permit him to appear in person if it considers that it would not be proper in all the circumstances to proceed in the absence of the applicant.

Necessity of section 2AD(3)

Section 2AD(3) requires the applicant to be outside Hong Kong when his appeal is lodged. The Administration considers this subsection necessary to avoid the possible influx of applicants to Hong Kong to lodge their appeals. This provision is consistent with the certificate of entitlement scheme which requires the applicant to remain outside Hong Kong while applying for a certificate and whilst appealing against any refusal of the Director to issue a certificate, and has been held by the Court of Final Appeal to be constitutional.

Notice of hearing date

The Tribunal will give a written notice to the parties concerned in every case stating the time and place of the hearing. As such, we propose to amend paragraph 11 to this effect.

I hope the above would facilitate the Subcommittee's discussion. Please note that the same officers will attend the next Subcommittee meeting to be held on 9 December 1999.

Yours sincerely,

(K S SO)
for Secretary for Security